In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 588

HENRY MONROE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 320 F. 2d 277. The opinion of the district court denying petitioner's motion to suppress evidence is reported at 205 F. Supp. 175.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1963. A petition for rehearing was denied on August 29, 1963. On September 26, 1963, Mr. Justice Black further extended the time for filing a petition for a writ of certiorari to and including October 28, 1963. The petition was filed on October

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28, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioner's testimony at a hearing on a motion to suppress evidence was properly admitted into evidence at his trial.

2. Whether petitioner was prejudiced by the admission at the trial of that portion of his testimony at the hearing which revealed prior convictions.

3. Whether there was probable cause for petitioner's arrest and the subsequent search.

4. Whether the trial court properly refused to disclose the name of a confidential informant who took no part in the transaction which formed the basis of the indictment.

5. Whether it was error to receive hearsay evidence elicited on cross-examination by petitioner's counsel.

STATEMENT

In the United States District Court for the Eastern District of Louisiana, petitioner was convicted by a jury under two counts of an indictment charging transportation of unlawfully imported narcotics, in violation of 21 U.S.C. 174, and charging transportation of unregistered and untaxed narcotics, in violation of 26 U.S.C. 4724 (R. 1-2, 161). Petitioner was sentenced to concurrent terms of twelve and ten years' imprisonment (R. 31). The court of appeals unanimously affirmed (320 F. 2d 277).

1. The evidence at the trial showed that when petitioner was arrested at a New Orleans railroad station

on November 18, 1961, he was found to be carrying a coffee jar filled with capsules which were shown on later analysis to contain heroin (R. 12, 62–64, 70–73, 90). When first arrested, petitioner gave the agents a false name (R. 69, 88–89).

Petitioner had moved before trial to suppress the heroin as evidence on the ground that the arrest and search were without probable cause. He testified at the hearing, under direct examination by his counsel, that the arrest was not made until after the search had been conducted; that he gave the agents a fictitious name; and that he told them the heroin had been stolen from an acquaintance (R. 131–132, 135). On cross-examination petitioner admitted to narcotics convictions in 1949 and 1954 and said that he intended to sell the narcotics found in his possession (R. 138–139, 148).

At the trial, the government introduced into evidence the transcript of petitioner's testimony at the hearing to suppress evidence (R. 130–150). Petitioner's counsel objected—in the presence of the jury—that reading the transcript would disclose his prior convictions (R. 128). The trial court answered the objection by stating that he would direct the Assistant United States Attorney to omit the portion of the transcript pertaining to past convictions (R. 128). Later the judge said that he had reconsidered the matter and would have the entire transcript of petitioner's testimony read into evidence (R. 128).

2. Narcotics agents testified for the government at the hearing on the motion to suppress that in August 1961, a special employee gave information that a local

woman named Margaret Thomas was selling heroin and was being supplied by a person from Chicago who had a mother or other relative living at 2209 Melpomene Street in New Orleans (R. 10, 193–194). Investigation revealed that Mrs. Emma Monroe resided at the Melpomene address and that she had placed telephone calls to a Henry Monroe at a Chicago number (R. 10, 194). In October, as a result of an inquiry to their Chicago office, the New Orleans agents learned that the Chicago telephone number was listed to a person named Henry Monroe (R. 11, 193). This person not only answered the special employee's description of Margaret Thomas's supplier, but he also had a record of two prior narcotics convictions and was well known in Chicago as a trafficker in narcotics (R. 11, 195, 197). The Chicago office sent to New Orleans a photograph of Henry Monroe, which was identified by the special employee (R. 11, 192). During the next month, one New Orleans agent saw petitioner enter Margaret Thomas's house, and another saw him on two occasions near the house (R. 11, 196, 207–209).

On November 15, 1961, after having been told by the special employee that petitioner had left New Orleans, presumably for Chicago, and that Margaret Thomas was expecting a new supply of narcotics, the agents placed all trains and airplanes from Chicago under surveillance (R. 11, 195–196). On the fourth day, they arrested petitioner as he was leaving a train from Chicago (R. 11–12, 191–192, 196–197, 208–210). At the time of arrest, one agent picked up a

paper bag which petitioner had set on the ground and inquired, "What have got here, Henry?" (R. 192). Petitioner answered, "You've got me" (R. 192, 210). The agents then took petitioner to a room in the train station where a search was conducted (R. 12, 192, 210). The paper bag was found to contain the capsules which proved to be heroin (R. 192).

The district judge denied the motion to suppress, finding that the search was an incident of a valid arrest for which there was probable cause (R. 14–18; 205 F. Supp. 175).

ARGUMENT

1. At the trial, petitioner's only objection to the admission of the transcript of his testimony on the motion to suppress was that it would reveal his prior convictions. He now argues that he was prejudiced by admissions in the transcript that he gave a fictitious name at the time of the arrest and that he told narcotic agents that he stole the heroin and planned to sell it (Pet. 13, 18).

Petitioner was represented by retained counsel at the hearing on the motion to suppress where he chose to testify. His testimony about the fictitious name, as well as his attempt to explain possession by declaring that the heroin had been stolen, were elicited by his own counsel on direct examination (R. 131–132). None of this testimony was necessary (indeed it had no relevancy) with respect to the question at issue on that motion—the probable cause for and the validity of petitioner's arrest. Petitioner could not have testified as to what probable cause the agents

had; the normal way to present that issue is to call the agents to the stand. As for petitioner's claim that the search preceded the arrest, he could have so testified without any reference to a claim that the heroin had been stolen. There is thus no reason why petitioner's statements, which were made voluntarily and with the aid of counsel, should not have been introduced in evidence against him as admissions against interest. And having "opened the door", petitioner cannot complain of admission of relevant cross-examination, to which no objection was made, on his intended disposition of the allegedly stolen heroin (R. 148). It is well established that statements made by an accused in a judicial proceeding can be introduced against him at his trial as admissions against interest. *Ayres* v. *United States*, 193 F. 2d 739 (C.A. 5, previous testimony in a habeas corpus hearing); *United States* v. *Adelman*, 107 F. 2d 497 (C.A. 2, previous testimony before a commissioner); *Milton* v. *United States*, 110 F. 2d 556 (C.A. D.C., previous testimony at trial on a different charge); *United States* v. *Johnson*, 76 F. Supp. 542 (M.D. Pa.), affirmed, 165 F. 2d 42 (C.A. 3), certiorari denied, 332 U.S. 852 (previous testimony before grand jury); 5 Wigmore, *Evidence*, Sec. 1416 (1940).

There is under the facts of this case no issue as to the admissibility of statements which a defendant must make in order to assert his rights under the Fourth Amendment. See *Bourg* v. *United States*, 286 F. 2d 124, 126 (C.A. 5), where it was held that an accused's motion to suppress evidence could not be

introduced at the trial.[1] As noted above, petitioner's testimony in the instant case had no relevance to his motion to suppress. The statements, having been freely offered at the hearing, were no different from other admissions against interest and were therefore properly received. For the same reason, there is no merit in petitioner's contention that the testimony constituted a confession which was coerced from him in a judicial proceeding (Pet. 13–15, 17–21). Petitioner, who was represented by retained counsel, was under no compulsion to testify as to these matters.

2. When petitioner objected to the introduction of the transcript on the ground that it revealed his prior narcotics convictions in 1949 and 1954, the court originally stated that it would direct the United States Attorney not to read that portion but subsequently changed its ruling. We think that the initial ruling of the court was correct and its subsequent ruling error. However, under the circumstances, the admission of such evidence was not prejudicial. *United States* v. *Henderson*, 185 F. 2d 189 (C.A. 7); *Campbell* v. *United States*, 176 F. 2d 45 (C.A. D.C.).

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[1] To our knowledge, *Bourg* v. *United States*, *supra*, is the only court of appeals' opinion which had discussed the admissibility of a motion to suppress evidence or testimony at the hearing since this Court decided *Jones* v. *United States*, 362 U.S. 257. Earlier cases admitted the evidence if the motion to suppress was denied and excluded it if the motion was granted. Compare *Fowler* v. *United States*, 239 F. 2d 93 (C.A. 10), with *Safarik* v. *United States*, 62 F. 2d 892 (C.A. 8), rehearing denied, 63 F. 2d 369; see also Maguire, *Evidence of Guilt*, Sec. 5.07 (1959).

Before the evidence was received, petitioner's counsel brought the existence of prior convictions to the attention of the jury. He objected to the admission of the transcript—in the presence of the jury—on the grounds that it would reveal petitioner's prior convictions (R. 128). Moreover, the evidence of guilt was overwhelming, four agents testifying to petitioner's possession of the narcotics and his guilty conduct.

3. The district judge properly found that the search was an incident of a lawful arrest for which there was probable cause. *Draper* v. *United States*, 358 U.S. 307. The government's showing of probable cause was even stronger than the showing in *Draper*, for here the agents not only knew the informant to be reliable, but also conducted an intensive investigation and found his information accurate in every detail.

4. Petitioner's requests at the trial to be told the name of the special employee were properly denied (R. 82, 128–129; Pet. 15–16). The government is privileged to keep secret the names of its informants, and the privilege is not to yield except in exceptional circumstances where disclosure is essential to the defense and for a fair determination of the cause. *Roviaro* v. *United States*, 353 U.S. 53; *Scher* v. *United States*, 305 U.S. 251. Here disclosure could have been of no assistance to petitioner's defense, for the special employee could give no testimony on the issues pertinent at the trial. This informant did not participate in the crime; nor did he have knowledge of how petitioner came into possession of the narcotics or of the circumstances surrounding the arrest and subsequent discovery of the narcotics on petitioner's person.

Scher v. *United States, supra; Miller* v. *United States*, 273 F. 2d 279 (C.A. 5), certiorari denied, 362 U.S. 928.[2]

5. There is no merit to petitioner's contention that error occurred in the admission of hearsay evidence—the testimony of a narcotics agent that he had reliable information that petitioner would be arriving in New Orleans with narcotics—because the evidence in question was elicited by petitioner's trial attorney during cross-examination of a government witness (R. 79; Pet. 15–17). *United States* v. *Mont*, 306 F. 2d 412, 415 (C.A. 2), certiorari denied, 371 U.S. 935.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1963.

[2] In *Rugendorf* v. *United States*, No. 223, pending on writ of certiorari, the claim is that the identity of the informant would throw light on the claimed defense of lack of knowledge.

U.S. GOVERNMENT PRINTING OFFICE 1963